Appendix A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 02-2963

Winston G. Chandler	*
Appellant	*Appeal from the
v.	*United States District
United States Air Force	*Court for the Eastern
Secretary, et. al.	*District of Arkansas
Appellees	*

The petition for the rehearing by the panel filed by the appellant is denied.

(513-010199)

April 18, 2003

Order Entered at the Direction of the Court: S/Michael E. Gans Clerk, U.S. Court of Appeals, Eighth Circuit

Appendix B

United States Court of Appeals

For The Eighth Circuit

No.02-2963EA

Winston G. Chandler	*
Plaintiff-Appellant	*
v.	*
The United States Air	* On appeal from the
Forces Secretary,	*United States District
Defendant-Appellee	*Court for the Eastern
Raymond H. Wellar, Chief	*District of Arkansas
of the Correction Board:	*
United States Air Force	*
Martha Maust, Panel Chair	*
United States Air Force.	*
Defendants	*

Submitted: December 2, 2002

Filed February 25, 2003

Before Morris Sheppard Arnold, Richard Arnold and Fagg, Circuit Judge.

He was promoted to First Lieutenant in 1950, and thereafter to Captain and Major. He retired from the Reserve as a Major in 1966. As we shall explain somewhat more detail later, he claims that he should have been promoted to Lieutenant Colonel before retirement. The Air Force Board rejected this claim, principally on (4b Appendix B) the basis that Reserve Officers Personnel Act, of (3b Appendix B) 1954 (ROPA), Pub L. 773, 83d Cong.2d Sess.c.1257, 68 State. 1147, on which Mr. Chadler mainly relied, did not apply to this case.

Our review of the Board's decision is limited. We must defer to the Air Force Boards interpretation of governing statutes, and accept that interpretation if it s reasonable regardless of how we might interpreted the statutes as an original matter. This deference, is perhaps at its zenith when military matters are involved. Our review of a military agency's decision "must be extremely deferential because of the confluence of the narrow scope of review under the APA and military settings Henry v. United States Dept of the Navy 77 F3d 271-272(8th Cir. 1996)

The key to Plaintiff's argument is that he should have been promoted from Second Lieutenant in August

1947, after three years as a Second Lieutenant. Instead he had to wait until June 12, 1950, more than five years. If promotion had occurred earlier he would have retired as a Lieutenant Colonel rather than a Major. Plaintiff cites 308 of ROPA. 68 Stat. At 1135-36. This provision plaintiff argues, his subsequent promotions would also have occurred earlier, and he would have retired as a Lieutenant Colonel rather than a Major. Plaintiff cites Section 308 of ROPA. 68 Stat. At 1155-56. This provision (4b Appendix B) reads in full as follows:

> Sec.308. Each nonunit officer of the Army Reserve who is found by the Secretary or any officer he designates to be qualified for promotion shall be promoted, effective on the date he has three years of promotion service, regardless of a vacancy in the grade of first lieutenant.

The first time it rejected Mr. Chandler's application, the Board relied, in part, on the advisory opinion of an officer of the Air Reserve Personnel Center to the effect that under Air Force regulations in effect before 1950, officers could be promoted only to fill existing vacancies. Section 308 of ROPA, just quoted, seems clearly inconsistent with this view. It mandates promotions

Section 308 of ROPA, just quoted, seems clearly inconsistent with this view. It mandates promotions regardless of a vacancy in the grade of first lieutenant." But does Section 308 apply to this case? Mr. Chandler claims the promotion in question should have occurred in 1947. ROPA was not enacted until September 3, 1954, with a general effective date of July 1,1955. ROPA §701.68 Stat. At 1188. . Retroactive is not favored in the law, and a statute will not be construed to have retroactive effect unless its language or context rather clearly so indicates. E.G. Bowen v. Georgetown University Hospital 488 U.S. 204 (1988). (5b Appendix B)

Nothing is Section 308 itself indicates that it was intended to be retroactive. On the contrary, the provision expressly looks to the future, stating that certain officers "shall be promoted" (emphasis supplied) under certain conditions. Plaintiff contends that ROPA §207 supplies the necessary retroactivity. This appears to be a mistaken citation. ROPA §207, 68 Stat. At 1152, applied to "Reserve officers who are hereafter ordered to active duty" (emphasis supplied). Mr. Chandler does not fit this category. He has never, while an officer in the Reserve, been ordered to active duty, either before or after the

enactment of ROPA. The plaintiff also cites, however, Section 207 of the Legislative Reorganization Act of 1946, Pub L.No. 601, 79th Cong. 2d Sess. C 753,60 Stat. 812,837. This is a general provision authorizing the secretaries of the military departments, acting through civilian boards, to correct military or naval records where "necessary to correct an error or to remove an injustice." We agree with plaintiff that the statute may, in some instances, authorize a retroactive promotion. But the authority is a general one. It applied where, for some legal reason, retroactive promotions is required, or at least appropriate, under law in effect at the relevant time, or later enacted and made retroactive to that time. That legal reason, plaintiff contends, is found in ROPA §308, but as we have seen, that provisions applies (6b Appendix B) only to situations arising after the effect date of ROPA.

In addition to these problems of retroactivity, plaintiff's ROPA theory faces another difficulty which appears to us to be insuperable. ROPA §308, on which his argument mainly depends, is in TITLE 111 of the Act, which, see §301, "applies only the Reserve officers of the Army", 68 Stat. At 1153. When ROPA was enacted, the plaintiff was not in the Army. He was in the Air Force,

which is governed by TITLE V of ROPA, 68 Stat. At 1171-83. The plaintiff initially became an officer at a time when the Air Force, then called the Army Air Corps, was par of the Army, but this situation had changed, and the Air Force had become a separate service, well before ROPA became law.

We concluded that our reviewing authority is not sufficient to allow us to set aside the decision of the Air Force Board for the Correction of Military Records. The Board's interpretation of the governing military statutes was not unreasonable. The Board's action was not so far out of bounds as to be justly denounced as arbitrary and capricious. The Judgment of the District Court is Affirmed.

A true copy. Attest;

CLERK, U.S. COURT OF APPEALS, EIGHTH IRCUIT.

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IN THE UNITED STATES COURT

EASTERN DISTRICT OF ARKANSAS

EASTERN DIVISION

WINSTON G. CHANDLER PLAINTIFF

V. NO.4:00 cv00572

SECRETARY OF THE UNITED

STATES AIR FORCE DEFENDANTS

ORDER GRANTING SUMMARY JUDGMENT

Plaintiff brought this action alleging that during his military career an Air Force mistake prevented him from receiving promotions due him, and that the Air Force Board for Correction of Military Records failed to correct a mistake pursuant to the Reserve Officer Personnel Act of 1954. This court dismissed Plaintiff's action as time-bared under 28 U.S.C. §240, on reconsideration, the Court found that pursuant the Little Tucker Act U.S.C. §1346, the Court of Federal Claims, rather than the District Court, had jurisdiction over the Plaintiff's claim.

On appeal, the Eighth Circuit, affirmed in part and reversed and remanded in part finding that the District Court has jurisdiction under the Administrative Procedure Act to review the decision of the Air Force Board for the Correction of Military Records. The Eighth Circuit directed this Court to decide plaintiff's claim under the Reserve Officer Personnel Act, using the standard set forth in the Administrative Procedure Act.

Brief Fact

Plaintiff was commissioned a second lieutenant on August 6, 1944. He was promoted to first lieutenant on June 12, 1950. Plaintiff was promoted to Captain on February 3, 1955, and to major on February 3, 1962. Plaintiff retired in 1966. Plaintiff contends that he should have been promoted to first lieutenant in February 1946. Plaintiff alleges that had he bee promoted as required, he would have been in a different promotion zone, the effect of which would have allowed him a promotion to lieutenant colonel in 1954 and perhaps further promotions prior to his retirement.

Plaintiff filed his first request for relief with the Air Force Board for Corrections of Military Records in 1983. Following administrative consideration, the Board denied his claim, concluding that he had not been placed in the wrong promotion zone. Plaintiff asked for reconsideration of the Board's denial of his claim for relief in 1995, and again was denied relief. After a third request for reconsideration, the Board again denied relief on March 20, 1999. Plaintiff filed this action in July 2000.

Standard of Review

The standard of review to be applied by this Court is governed by the Administrative Procedures Act. 5 U.S.C. §§701-706(1976(APA) "A reviewing court is directed to hold unlawful and set aside agency actions, findings, and conclusions found to be...arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law or unsupported by substantial evidence." Chappell v. Wallace, 462 U.S. 296(1983). The standard is a narrow one. The Court may not substitute its own judgment for that of the agency.

Discussion

Plaintiff argues that he should have been promoted to first lieutenant in 1946 pursuant to the Reserve Officers Personnel Act of 1954. The Air Force Board for the Correction of Military Records concluded that there was no provisions for promotions boards in 1955 and the Reserve Officers Personnel Act (ROPA) which was passed in September 1954 did not become effective until July 1, 1955. The Board found that following the passage of ROPA, the Plaintiff was considered and selected by the first promotion board to the Reserve grade of Captain. Thus, regardless of when the Plaintiff was promoted to first

lieutenant, his date of rank to Captain and Major would not change since he was considered and selected by the first promotion board following the passage of the ROPA to the reserve grade of Captain.

Plaintiff argues tat the language found in the legislative history of the ROPA, Senate Report 83-2010, July 29, 1954, referring to Section 208 of the ROPA wherein it states: "this subsection provides that, in Carrying out the provisions of this title, a promotion may be made effective before, on or after the date accomplished" establishes the retroactivity of the Act. Section 208 of the ROPA specifically addresses the promotion procedure available where an officer is recommended for promotion by a selection board or is found qualified for Federal recognition in the next higher grade, but does not receive that promotion because he is removed from active status prior to such promotion. There is no indication that the language relied upon by the Plaintiff is intended to effect the applicability of the entire Act. Instead, the language is limited to the specific situation addressed in Section 208. Instead, Section 701 of the ROPA provides an effective date of July 1, 1955. There is no indication of congressional intent that the

ROPA be applied retroactively. The Congressional History of the ROPA reflects that the purpose of the Act was to provide for officers of the Reserve Component of the military a statutory basis for promotion, and elimination comparable to that provided for officers of the Regular Component of the military personnel act of 1947. The Legislative History states, "this bill does not establish promotion and elimination procedures which are basically new", but translation the regulations under which the military services are currently operating into a statutory form with important changes to the Army and the Air Force.

Retroactivity is not favored in the law. The presumption against retroactive legislation is deeply rooted in our history. *Bowen v. Georgetown University Hospital* 488 U.S. 204 (1988). Congressional enactments will not be construed to have retroactive effect, unless their language requires such a result Id. The Court finds no such language in either the ROPA or the Legislative History of the Act.

After carefully considering the Plaintiff's allegations and the record, the Court finds that the facts, taken in the light most favorable to Plaintiff do not support the conclusion that the decision of the Air Force Board for

Correction of Military Records was contrary to the law, and an abuse of discretion or arbitrary or capricious. As such, Plaintiff's relief is denied. Defendant's second motion for summary judgment(docket #19) is granted.

IT IS SO ORDERED this 16th day of July, 2002

Signed/James M. Moody

James M. Moody

United States District Judge

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